Supreme Court, U. S.
FILED
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77-1605

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1978

No. 76-108-D

Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

SYDNEY M. EISENBERG,

Petitioner,

— vs —

BOARD OF WISCONSIN STATE BAR COMMISSIONERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

SYDNEY M. EISENBERG,
Petitioner

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No. 76-108-D

August Term, 1977

STATE OF WISCONSIN IN SUPREME COURT

IN THE MATTER OF DISCIPLINARY PROCEEDINGS

AGAINST SYDNEY M. EISENBERG, ATTORNEY AT LAW.

PER CURIAM. This is an original action filed by the Board of State Bar Commissioners pursuant to sec. 256.283, Stats., seeking disciplinary action against Sydney M. Eisenberg, an attorney admitted to practice in this state since 1939, except for the period of an earlier suspension. Eisenberg practices in Milwaukee. The complaint of the Board alleges that Eisenberg was convicted in federal court of three counts of willfully making and subscribing a false individual income tax return in violation of 26 U.S.C. §7206 (1). The substance of the charges was that for the years 1968, 1969 and 1970 Eisenberg filed returns which substantially understated his adjusted gross income and as to 1968, overstated his interest expense. Eisenberg was fined $3,000 on the first count, $1,000 on the second count, and $3,000 on the third count. He appealed the convictions to the United States Court of Appeals for the Seventh Circuit which on November 1, 1977, affirmed the convictions on all three counts.

The Honorable Elton J. Morrison was appointed referee to hear the complaint. He filed his report on April 22, 1977. In the report he recommended that Eisenberg be fined $1,000 on each of the three counts, and expressly did not

recommend any period of suspension.

This matter was taken under advisement on October 3, 1977. At that time Eisenberg's appeal had been argued but not decided by the Seventh Circuit. We determined that we would await the decision on the appeal before acting on the referee's report. Eisenberg advises us that he will file a motion for rehearing in the Seventh Circuit and if that fails, to petition the United States Supreme Court for a writ of certiorari. He requests that pending those further appeals no action be taken herein. We do not believe that any additional delay in this matter is warranted and thus we deny the request.

The Board of State Bar Commissioners has moved to strike those portions of the evidence which impeach or conflict with the tax conviction and urge that Eisenberg's license to practice law be suspended for a "substantial period of time" but does not suggest any specific period. Eisenberg, on the other hand, has filed a motion for this Court to affirm the referee's recommendations.

There are two issues presented to us for decision: (1) does sec. 256.283 (7), Stats., render inadmissible evidence offered to prove Eisenberg's lack of knowledge of the falsity of the returns and reliance on bookkeepers and accountants; and (2) should Eisenberg be suspended from the practice of law because of his convictions?

As to the admissibility issue, section 256.283 (7) provides that "in any disciplinary proceeding instituted against an attorney based on a conviction, the certificate of his convic-

tion shall be conclusive evidence of his guilt of the crime for which he has been convicted." Eisenberg was convicted of violating 26 U.S.C. §7206 (1) which provides that any person who "willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than three years, or both, together with costs of prosecution." The essence of the crime of which Eisenberg was convicted was that under penalty of perjury he filed a tax return which he did "not believe to be true." His principal contention at trial and on appeal was the same as made here, that he relied upon bookkeepers and accountants to prepare his returns and did not knowingly sign a false return.

The trial judge who heard the case rejected this argument as did the Court of Appeals, which in its opinion pointed to specific acts of Eisenberg which supported the trial judge's conclusion that Eisenberg was aware of and participated in the "pattern of manipulation" which resulted in the false returns.

The evidence introduced at the hearing before the referee was cumulative to the testimony introduced at the trial, its purpose being to show that Eisenberg relied on others to keep his financial records and prepare his returns and thus his guilt was only of a technical nature and based upon a legal presumption. The referee admitted the testimony over the objection of the Board, stating that he was admitting it not for

the purpose of impeaching the conviction, but to show mitigating circumstances and thus relevant to the discipline to be imposed.

Section 256.283 (7) was adopted by this Court in 1971, 48 Wis. 2d vii, in response to a petition filed by the Board of State Bar Commissioners. In its petition the Board stated that it incorporated many of the recommendations of the American Bar Association's Special Committee on the Evaluation of Disciplinary Enforcement of the American Bar Association (the Clark Committee). One of the recommendations of that committee was for the adoption of a rule such as that contained in sec. 256.283 (7). The committee further recommended that "in any proceeding to determine the extent of discipline to be imposed, the attorney may offer evidence of mitigating circumstances not inconsistent with the essential elements of the crime as determined by the statute defining the crime." (Emphasis supplied.)

Accepting this statement as to the proper application of section 256.283 (7), the question then is whether the evidence to which the Board objects and which was admitted by the referee to show mitigating circumstances was "inconsistent with the essential elements of the crime." We believe that it was, and therefore grant the motion of the Board to strike the testimony. The same type of evidence was introduced at the trial to attempt to show that Eisenberg did not "willfully" or knowingly sign a false return. His defense before the referee was the same as that made to and rejected by the federal courts, that he did not know the return was false. The type of evidence we believe is admissible to show mitigating circumstances would relate to family problems, medical problems, civic responsibilities,

character references, age, experience, dominating influence of another, and the like. The evidence submitted by Eisenberg is not of that nature and thus should not have been admitted.

The second question is what discipline should be imposed. The referee recommends a fine of $3,000 and Eisenberg supports this, while the Board wants a substantial period of suspension. The referee gave the following reasons for recommending against any suspension: there is no statutory crime involved, no unsatisfactory client relationship is stated, the conviction is based entirely upon the returns filed and the presumptions arising therefrom, the trial judge stated that this was not a tax evasion case, imposed a sentence of only a fine, and Eisenberg's earlier discipline is immaterial because it did not involve tax evasion.

We do not agree with the referee's basis for his recommended discipline. The crime of which Eisenberg was convicted was a felony created by statute. The fact that no unsatisfactory client relationship was involved is not necessarily significant. We have in the past imposed a period of suspension in such circumstances. State v. MacIntyre, 41 Wis. 2d 481, 164 N.W. 2d 235 (1969), State v. Cain, 19 Wis. 2d 50, 119 N.W. 2d 391 (1963).

A reading of the Court of Appeals decision in Eisenberg's appeal does not support the statement that the conviction was based solely upon the legal presumption that Eisenberg was responsible for what was in the returns he signed. The Court of Appeals pointed to specific acts by Eisenberg that supported the conviction and stated that the trial judge found a patter of manipulation

in his financial activities. The statement by the trial judge that this was not a tax evasion case is not particularly significant because the judge was simply pointing out the fact that Eisenberg was not charged under 26 U.S.C. §7201 with tax evasion, but under 26 U.S.C. §7206 with signing a return he believed was false. This does not diminish the fact that Eisenberg was convicted of a felony.

The referee discounted the significance of Eisenberg's earlier discipline by this Court, State v. Eisenberg, 48 Wis. 2d 364, 180 N.W. 2d 529 (1970) on the ground that it did not involve an income tax related matter. We do not accept this principle. We have in the past taken into consideration the fact that discipline was previously imposed against the same attorney without requiring that it be the same type of misconduct. In State v. Aldrich, 71 Wis. 2d 206, 237 N.W. 2d 689 (1976), for example, we listed as one of the factors to be weighed in imposing discipline the prior reprimand by this Court for failure to file an income tax return, even though the second case involved misuse of clients' funds, not another tax violation. Here, where the tax misconduct came second, we have the reverse situation, but the principle is equally applicable.

In most cases involving failure to file convictions, which are misdemeanors, we have only reprimanded the attorney. In The Matter of Disciplinary Proceedings Agsint Jorstad, 74 Wis. 2d 302, 246 N.W. 2d 665 (1976); State v. Jackson, 74 Wis. 2d 188, 246 N.W. 2d 503 (1976). In tax evasion cases, however, we have imposed substantial periods of suspension; State v. Kondos, 66 Wis. 2d 119, 724 N.W. 2d 211 (1974); State v. MacIntyre, supra, State v. Cain, supra.

In the instant case the crime involved is a felony rather than a misdemeanor, and thus closer to the tax evasion rather than the failure to file cases. We conclude that a period of suspension of six months is appropriate.

It is ordered and adjudged that Sydney Eisenberg be suspended from the practice of law in this state for a period of six months from the entering of this order and for such additional period thereafter as shall expire before his license is restored. Reinstatement is conditioned upon the payment of the costs of these proceedings to the clerk of this Court not to exceed $2,000 and compliance with Rule 9 of the Rules Governing Discipline of Attorneys.

It is further ordered that the State Bar of Wisconsin notify the courts of record of this order by sending a copy to each.

It is further ordered that Sydney Eisenberg notify his clients that his license to practice law in this state is suspended.

Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

Marilyn L. Graves,
Acting Clerk

Madison, March 3, 1978

To Robert H. Bichler
840 Lake Ave., P. O. Box 516
Racine, WI 53403

Ray T. McCann
425 Caswell Bldg.
152 W. Wisconsin Ave.
Milwaukee, WI 53203

The Court today announced decision in your case as follows:

76-108-D - In the Matter of the Disciplinary Proceedings Against Sydney M. Eisenberg, Attorney at Law

MOTION FOR REHEARING DENIED WITHOUT COSTS.

(Justices Abrahamson and Callow took no part.)

Respectfully yours,

Marilyn L. Graves,
Acting Clerk of Supreme Court.

Nankin, Schnoll & Company
Certified Public Accountants

Suite 606 / 1212 West Wisconsin Avenue /
Milwaukee, Wisconsin 53233 / Telephone 344-3700
area code 414

HOWARD M. SCHNOLL, C.P.A.
ARMIN H. NANKIN, C.P.A.
EDWARD GILLMAN, C.P.A.

Dear Client:

Thank you for the opportunity of serving you. The attached income tax returns are exact copies of the originals which we have prepared for you. Please file these copies in a safe place for future reference.

For your protection we have retained in our permanent files our interview sheet and working papers, together with a copy of your returns. If you lose or misplace your copies or desire any information, please call us.

Income tax returns are being checked quite frequently these days by both Wisconsin and Federal Governments. If any inquiry is made on your income tax returns by the tax authorities, please feel free to call us immediately for information or assistance. Often small matters develop into large ones because of misunderstandings of questions asked or proof required. Our fee on these matters will depends on the nature and importance of the work.

If you have any questions, please do not hesitate to call us.

Very truly yours,

Relief Sought

This Petition is brought before the United States Supreme Court because this action of the Wisconsin Supreme Court violates the constitutional rights of every Petitioner and every other Wisconsin lawyer. The decision herein should be set aside and held for naught on constitutional grounds.

It is everyman's right to work at and practice his chosen job or profession. His clients were always fully represented and well treated. Lawyers do not live in a vacuum. They breathe, work and sleep like everyone else.

There is no reason whatsoever to mistrust Petitioner. The circumstances are such that Petitioner harmed no one and punishing him for something he does not believe he is guilty of is simply unfair.

How and why should Petitioner wear sackcloth and ashes when he knows he has misled no one and is truly the injured party. In no way does one who knows the true facts have to do anything but as a lawyer respect the courts. The supplementary appendix filed herein has been made available by filing with the United States Supreme Court so that true facts in the case can be easily verified and truth can be separated from inferences and innuendoes.

IN THE

SUPREME COURT OF THE UNITED STATES

Term 1978

No. 76-108-D

SYDNEY M. EISENBERG

Petitioner

-vs-

BOARD OF WISCONSIN STATE BAR COMMISSIONERS

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

STATEMENT OF CASE

The case was based on a complaint filed by an attorney for the Board of Bar Commissioners members appointed by the Wisconsin Supreme Court under Section 256.28 of the Wisconsin Statutes. The said Board of Wisconsin State Bar Commissioners presented a complaint to said Wisconsin Supreme Court for discipline of Petitioner and under date of August 24, 1976 Petitioner was ordered to answer. Petitioner entered a plea in abatement and Respondent moved to strike. Motion to strike plea was denied with leave to reassert it after post conviction motions had

been decided in the tax court prosecution.

Every lawyer in the State of Wisconsin is required to be a member of the Bar Association. There is a Wisconsin Bar Association and there is a local Milwaukee Bar Association. Both bar associations have officials selected and elected by the members of the Bar Association wherein committees are appointed to hear complaints, take testimony with respect to such complaints, and arrive at conclusions.

The Board of State Bar Commissioners consists of nine members, of which two members of the board are non-lawyers, but all are appointed by the Supreme Court. Four members of the board constitute a quorum. The board conducts investigation and prosecution against attorneys and such other duties as may be assigned by the Supreme Court. The Supreme Court on occasion may require and appoint competent attorneys or members of the bar to act as counsel for the State Bar Commissioners.

With respect to the first suspension involving Petitioner, which occurred during the three-year period for which Petitioner is being held responsible for the accounting of his certified public accountants, although Petitioner was not even in the office building containing the office records; both the suspension and the tax case are referred to in Supreme Court Case No. 77-1063 presently under consideration by the United States Supreme Court.

In the instant case, wherein Petitioner seeks a Writ of Certiorari to the Wisconsin Supreme Court, because of the second suspension the Wisconsin Supreme Court apparently is basing

the second upon the basis of the tax convictions and the first suspension, both of which should never have taken place in the interests of justice and fairness, so Petitioner is now facing a second suspension based on the keeping of records for a period of time during which, in the most part, he was not even in the office, and on the basis of the first suspension for which the Referee had completely exonerated him, so that there is, in effect, no end to this madness.

The Referee appointed in the first suspension, after months of testimony wherein he saw the witnesses, observed their demeanor, and was in the best position to determine the veracity, completely absolved Petitioner of having done anything whatsoever wrong with respect to his conduct concerning Judge Krueger, a man who was mentally ill, who came to Petitioner for assistance, and was given assistance by Petitioner. Petitioner received no thanks for the time and effort expended in trying to help a sick man, but was amazed at the conduct of the local newspaper staff, namely, the Milwaukee Journal and Milwaukee Sentinel, and brought before the Referee the truth as to the events which preceded the Judge's suicide.

The Supreme Court, at the urging of the Milwaukee Sentinel, published by the Milwaukee Journal, in an editorial, practically demanded that the Board of Bar Commissioners hear the complaint rather than the Bar Association. A copy of the editorial is included in Exhibits located in Appendix.

The Wisconsin Supreme Court refused to accept the Referee's detailed conclusions, and, instead, suspended Petitioner from the practice

of law for twelve months, which was extended to twenty-one months by the machinations of the individuals charged with reinstating Petitioner.

The Wisconsin Supreme Court in its decision revoked the license of Petitioner for another six month period in the instant case because this was a second offense. The Wisconsin Supreme Court ignored the decision of the second Referee which is printed in this Petition.

ISSUES PRESENTED

I. Should a Petitioner be suspended from the practice of law for six months because of a three count conviction for filing false tax returns. It is uncontroverted the returns were prepared by two sets of Certified Public Accountants upon whom Petitioner completely relied upon for accuracy and truthfulness.

II. Can Respondent fail to produce witnesses to support his request for suspension of a lawyer and simply rely on a false tax return conviction without any proof bearing upon unprofessional conduct other than the unsatisfactory tax return and base this record for a suspension from practice of law?

III. Where there has been no breach of attorney-client relationship and the attorney's case is still in appeal, and the conviction does not involve any moral turpitude violation, can a lawyer be suspended from the practice of law?

IV. When considering the test for the right of an attorney to practice law as his rights are guaranteed by the Fourteenth Amendment of the Constitution of the United States, is it lawful to disregard the recommendation of the Referee who stated:

> "For the benefit of those who are required to file income tax reports, particularly those of the legal profession, I think it is fortunate that this present case has arisen at this time so that we may be clearly advised by this Court what is the real responsibility of a taxpayer who relies almost completely on the

advice and labor of certified public accountants and presumably competent bookkeepers.

"As perhaps never before do we find so many taxpayers who depend upon the above experts to make out their returns. To what extent may the taxpayer safely rely on returns so made out? To what degree should the taxpayer be held responsible even though he may have little knowledge of the law and the requirements of a proper tax return? Income tax laws have become increasingly intricate and more difficult to understand. The finality of this case should well operate as a safe guide for the present and future taxpayers."

V. Fair Trial: Amendments I, V, and XIV of the Constituion of the United States?

VI. Can the Wisconsin Supreme Court improperly assume and aver in its decision that Petitioner produced accumulative evidence before the Referee the same way he produced defense evidence in the tax trial, when in truth and fact Petitioner did not offer any defense in his trial because his attorneys refused to office testimony because they were absolutely convinced the Government had proven no case whatsoever?

VII. Is an attorney allowed to prove mitigating circumstances in a disciplinary case under the 14th Amendment, 1st and 5th Amendments?

Attorney Bichler's statement of facts in his petition for review to the Wisconsin Supreme Court stated as follows:

STATEMENT OF FACTS

Under date of August 4, 1975, a Grand Jury in the United States District Court for the Eastern District of Wisconsin issued a three count indictment charging the following:

"THE GRAND JURY CHARGES:

That on or about the 15th day of April, 1969, in the Eastern District of Wisconsin,

SYDNEY M. EISENBERG,

a resident of Milwaukee, did wilfully and knowingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1968, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter, in that the said return reported adjusted gross income in the amount of $70,105.88, and interest expense in the amount of $63,670.66, whereas, as he then and there well knew and believed, he received substantial adjusted gross income in addition to that heretofore stated and the interest expense was substantially less than stated, in violation of Section 7206(1), Internal Revenue Code; 26 U.S.C. Section 7206(1).

"THE GRAND JURY FURTHER CHARGES:

That on or about the 16th day of June, 1970, in the State and Eastern District of Wisconsin,

SYDNEY M. EISENBERG,

a resident of Milwaukee, did wilfully and knowingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1969, which was verified by a written declaration that it was made under the penalties of perjury, and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter, in that said return reported adjusted gross income in the amount of $68,526.67, whereas, as he then and there well knew and believed, he received substantial adjusted gross income in violation to that heretofore stated, all in violation of Internal Revenue Code, Section 7206(1) and Title 26, Section 7206(1), United States Code.

"THE GRAND JURY FURTHER CHARGES:

That on or about the 14th day of June, 1971, in the State and Eastern District of Wisconsin,

SYDNEY M. EISENBERG,

a resident of Milwaukee, did wilfully and knowingly make and subscribe a

United States individual income tax return, Form 1040, for the calendar year 1970, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter, in that said return reported adjusted gross income in the amount of $38,012.00 whereas, as he then and there well knew and believed, he received substantial adjusted gross income in addition to that heretofore stated, all in violation of Section 7206(1), Internal Revenue Code; 26 U.S.C. Section 7206(1)."

The charges were tried in United States District Court for the Eastern District of Wisconsin before The Honorable Harlington Wood, Jr. and on June 29, 1976, the defendant was found guilty of each of the charges. Sentence was imposed fining the defendant the sum of $3,000.00 on Count I, $1,000.00 on Count II and $3,000.00 on Count III.

The complaint of the Board of State Bar Commissioners was presented to this Court for discipline of respondent and under date of August 24, 1976, respondent was ordered to answer. Respondent entered a plea in abatement and petitioner moved to strike. Motion to strike plea was denied with leave to reassert it after post conviction motions had been decided in the tax court prosecution.

Under date of December 10, 1976, United States District Court for the Eastern District of Wisconsin denied all post-conviction motions

as being without merit. Thereafter the petitioner in these proceedings moved to strike the plea in abatement and for summary suspension under Section 256.285. This Court then struck the plea in abatement and denied the motion for summary suspension.

Thereafter the Honorable Elton J. Morrison was appointed to try the issues and report his findings and recommendations. Defendant then submitted an amended answer. The petitioner moved to strike the amended answer on the basis of its allegations being insufficient as a defense and as being immaterial to these proceedings. The motion was heard by the Referee. The Referee indicated he would receive no evidence in reference to the charge itself but would receive evidence on the question of what penalty should be imposed.

The petitioner presented its case by submission of the indictments and certified copy of the judgment of conviction.

Respondent over objection of the petitioner's counsel presented evidence relating to the manner and method of the preparation of the income tax returns for the years of conviction. Petitioner objected to any such testimony because Section 256.283(7) makes the judgment of conviction conclusive evidence of the guilt of the crime. Petitioner argued that all evidence relating to preparation of the return was incompetent as an attempt to impeach Petitioner's conclusive evidence.

In his report the Referee has recommended that respondent be assessed a fine of $1,000.00 on each of the three counts in the Complaint to-

gether with the costs, including the compensation of State's Attorney and Referee. The Referee further stated, "I do not recommend any suspension of his license because there is no statutory crime involved and no unsatisfactory client relationship."

The State moved the Supreme Court to strike from the record all evidence and any findings which conflict with or which tend to impeach the findings and judgment of the Federal Court and then moved that court for judgment suspending Respondent's license to practice law for such period deemed appropriate by the Court and imposing the fines and costs as recommended by the Referee. The Respondent moved to affirm in all respects the report of the Referee.

Judge Morrison, Referee, with years of trial judge experience, after hearing the testimony in full, made the following formal findings of fact and recommendations:

FINDINGS OF FACT

General

The defendant Sydney M. Eisenberg was born on June 20, 1916.

Defendant holds a Bachelor of Education degree from the old Milwaukee State Teachers College and a Doctors degree in law from Marquette University. He has practiced law in Milwaukee continually since 1939, except for a short period of time because of the so-called Krueger episode hereinafter referred to.

The defendant was married in April of 1952. His wife is a successful lawyer in her own right in Milwaukee.

The defendant maintains a firm of lawyers and has a staff of bookkeepers and C.P.A.'s employed to assist in his law bookkeeping and also with his extensive stock, bond and real estate business, some of which he inherited and much of which he has added to during his practice.

The defendant has admittedly depended largely upon experienced bookkeepers and C.P.A.'s to record and manage the books pertaining to his various law and business affairs.

Following are my Specific Findings on matters controversial:

1. The defendant was convicted on November 3, 1970, for engaging in character assassinations with reference to now deceased Judge Krueger.

2. No income tax violation was involved in the above matter.

3. He has never been convicted of any offenses of any kind, except traffic violations.

4. He gave no active personal attention to his preparation of his income tax returns for the years of 1968, 1969, 1970. He had confidence in, and relied upon, the integrity and expertise of hired bookkeepers and C.P.A.'s.

5. Some of the bookkeeping was carelessly done, as exemplified in the Robert Katz account where she admitted she erred when she took the accumulated total each month and made a grand total thereof.

6. Much of the testimony in defendant's defense was properly objected to by plaintiff as immaterial on the grounds that the conviction in Federal Court is conclusive. It was received only for the limited purpose of possibly gleaning therefrom mitigating circumstances and assisting this Court in passing upon the proper discipline to apply herein.

On August 4, 1975, the Grand Jury in the United States District Court for Eastern District of Wisconsin issued a True Bill:

> A. Finding the defendant guilty of having wilfully and knowingly made and subscribed an individual income tax return for the year 1968 reporting an adjusted gross

income in the amount of $70,105.88, and interest expense in the amount of $63,670.66, whereas defendant knew and believed there was substantial adjusted gross income in addition thereto and expense substantially less.

B. A second count was in like language, except the amount of the reported income was $68,526.67.

C. A third count was similar to the two above, except the gross income was reported as $38,012.00.

On June 29, 1976, the Federal Court, with Judge Harlington Wood, Jr. presiding, pronounced judgment finding defendant guilty on the three counts, assessed a fine of $3,000.00 on Count 1, $1,000.00 on Count 2, and $3,000.00 on Count 3, a total fine of $7,000.

On December 15, 1976, defendant completed an appeal to the United States Court of Appeals after Judge Wood denied defendant's motion for a new trial.

Counsels' Briefs

Plaintiff's Briefs

1. Allegations and attempts to prove defendant innocent of plaintiff's charges are immaterial, as convictions thereof in the Federal Court are now conclusive. 256.283(7) Stat. 48 Wis. (2) vii.

A. In the Federal Court, guilty beyond reasonable doubt was necessary. In our Court, preponderance of evidence is sufficient.

2. Defendant has been previously disciplined. State vs. Eisenberg, 180 N.W. (2) 529; 48 Wis. (2) 364.

A. This Court should give consideration to the foregoing fact.

3. Three purposes for discipline:

A. Protect public

B. Rehabilitation of the attorney

C. To provide deterrent to other attorneys

4. Severe discipline must now be imposed.

Plaintiff's Supplementary Brief

1. Much of testimony offered at the hearing on April 5, 1977, is inadmissible and immaterial, as it tends to contradict guilty found in Federal Court.

(My note: Record will show plaintiff's objections to such testimony was sustained except as to show possible mitigation and now attempt to rehabilitate himself.)

2. Defendant should not be allowed to complain about the manner his first counsel in Federal Court erred in not having defendant present

any defense in Federal Court.

(Note: His present able counsel also indicates he would have used defendant and the witnesses used in the trial on April 5, 1977, back in the Federal Court trial. The situation would appear quite difficult to explain except for the remarks of Judge Wood in Federal Court to the effect that defendant's counsel there was very able and the case well tried.)

3. It appears that appropriate discipline be a minimum of suspension of three years, if not revocation of license.

(Note: In his Brief, plaintiff asserts, "The State requests that the Referee reopen the hearing so that the clamor of the multitude of complainants against this attorney for his professional conduct might be heard."

In justice to the defendant, I must report to the Court that at the hearing the plaintiff produced no witnesses or any proof bearing upon unprofessional conduct other than the unsatisfactory tax return. On the other hand, the defendant's witnesses included past and present employees, and others, all of whom expressed only favorable opinions. Concerning the plaintiff's character and ability, his admitted heavy practice should be considered in his favor where none of those "multitude of complainants" appeared at the hearing to express their disfavor and dislike of defendant. Obviously, I feel limited by the record as disclosed at the hearing, rather than give much credence to rumors, if indeed any exist.)

Defendant's Briefs

1. Defendant criticizes plaintiff where in plaintiff's first Brief it is stated that "It is most significant to note that the third of the three felonies of which the defendant has been convicted was perpetrated after the court's decision finding him guilty of unprofessional conduct. It was perpetrated during the period of his previous suspension."

In plaintiff's second Brief, the matter should be satisfactorily resolved by the statement of plaintiff, stating "The petitioner does not make this accusation." (Page 1)

2. Defendant does not deny the conviction, but points out that an appeal therefrom is pending.

3. Defendant should not have his license suspended until there has been a full hearing upon the appeal. Moreover, nobody has complained that there has been any breach of attorney-client relationship.

4. In lieu of any suspension, a nominal fine, together with costs of these proceedings, be assessed against the defendant.

My Recommendations

It is my recommendation that the defendant be assessed a fine of One Thousand Dollars on each of the three counts charged, together with the costs, including the compensation of the State's attorney and Referee.

I do not recommend any suspension of his license because there is no statutory crime involved and no unsatisfactory client relationship asserted. His conviction is based entirely upon income tax returns and the presumptions arising from the substantial discrepancy between his gross income and improper deductions and allowances. In Federal Court the Grand Jury, and later the Federal Judge ruled that the discrepancies were so substantial as to raise the presumption and justify the finding that the defendant must have known the real facts, and thus he consequently was guilty of wilfully falsifying his income tax returns.

After the case was apparently thoroughly tried in Federal Court, and effectively contested throughout, I am impressed with the following comments of Federal Judge Wood, Jr. when he pronounced sentence:

> "This is not a tax evasion case. This is a false statement case which the Congress has considered to be less, and I do, too; and I think, under these circumstances, taking into consideration many of the things the defendant himself has said. it is not a case for any time. So it is going to be a matter of a fine." (Page 3, Defendant's Memorandum, September 22, 1976.) xx "I don't think Mr. Eisenberg needs any supervision at all." (Page 4 of above.)

While I have found the defendant was disciplined in 180 N.W. (2) 529, 48 Wis. (2) 364, to the extent of having his license to practice suspended for one year, I regard that has little effect at this time. The earlier case involved

reprehensible character assassination, and was so properly recognized by this Court. Had it involved tax evasion, it would have had a strong bearing on the case we are now considering. State vs. MacIntyre (1969) 41 Wis. (2) 481, 164 N.W. (2) 235.

Notwithstanding the fact that Judge Wood expressed a bit of compassion for the defendant when he pronounced sentence, he imposed a fine of $3,000 on Count 1, $1,000 on Count 2, $3,000 on Count 3, a total of $7,000.

In reviewing practically all of the Wisconsin cases affecting income tax returns, I have found no case exactly comparable. There are two, however, which have some bearing.

In State vs. Roggensack, 19 Wis. (2), 38, the defendant had properly and accurately filed his income tax returns each year, but because in some years he had found himself in financial straits, he filed late and submitted to the statutory fine. At that time the case of State vs. McKinnon (1953) 263 Wis. 413, 57 N.W. (2d) 404, had not ever been reversed so that it was necessary to find a defendant guilty of moral turpitude. In the Roggensack case our Court overruled the McKinnon case and held that the defendant was subject to discipline because he had not paid the tax on time, and that it was so unprofessional for an attorney to be owing an income tax debt that it merits disciplinary action.

In the second case of Wisconsin vs. Cain, 19 Wis. (2d) 50, the defendant and his lawyer wife kept entirely inadequate books and approximated the profits derived from their many impor-

tant cases. The practice was so sloven and their conclusions so advantageous to themselves that it was not difficult for the court, both Federal and this Court, to find the defendant guilty of wilful and intentional evasion of paying their just and legal taxes.

I call attention to the case of United States vs. Pechenik, 236 F. 2d, 844 (3rd. Cir. 1956). This case has been cited by defendant Eisenberg in support of his appeal of his conviction in his recent Federal case. In that case, the defendant left his returns to his bookkeeper and accountant, which was practically the situation with defendant Eisenberg. He was indicted on the theory that he wilfully understood his corporation tax by treating capital expenditures as operating expenses. The verdict was reversed in the Court of Appeals, because the evidence did not support the verdict. The Court found in effect that the defendant had no part in the errors.

The Court implied that to find the defendant guilty, it must be found that the defendant participated in and directed or knew the books were kept incorrectly. (Defendant's motion in Federal Court for "judgment of acquittal not withstanding the verdict." Page 9.)

Actually, we may disregard the foregoing language, since in the case at bar we rely on the verdict of guilty rendered by the jury in Federal Court, and later confirmed by Judge Wood. Such verdict is now conclusive and may not now be attacked. 256.283(7) Wis. Stats.

For the benefit of those who are required to file income tax reports, particularly those of the legal profession, I think it is fortunate

that this present case has arisen at this time so that we may be clearly advised by this Court what is the real responsibility of a taxpayer who relies almost completely on the advice and labor of certified public accountants and presumably competent bookkeepers.

As perhaps never before do we find so many taxpayers who depend upon the above experts to make out their returns. To what extent may the taxpayer safely rely on returns so made out? To what degree should the taxpayer be held responsible even though he may have little knowledge of the law and the requirements of a proper tax return? Income tax laws have become increasingly intricate and more difficult to understand. The finality of this case should well operate as a safe guide for the present and future taxpayers.

Dated: April 20, 1977.

Respectfully submitted,

/s/ ELTON J. MORRISON
Referee

Said Counsel for the Wisconsin Board of Bar Commissioners in his brief to the Wisconsin Supreme Court argued as follows:

ARGUMENT

I. All Evidence And Findings Relating To Preparation Of Returns Must Be Stricken.

In his amended answer and at the hearing, the Respondent proffered facts relating back to the time of preparation of the tax returns. Such allegations and proof appear to be for the purpose of contradicting the findings and judgment in the criminal action. The Referee appears to have considered these facts in making his recommendation.

All such allegations and proof are irrelevant to these proceedings for the reason that Section 256.283(7) provides:

> "Criminal conviction constitutes conclusive proof of guilt. In any disciplinary proceeding instituted against an attorney based on a conviction, the certificate of his conviction shall be conclusive evidence of his guilt of the crime for which he has been convicted."

The foregoing section was created by this Court and became effective January 12, 1971, 48 Wis. (2d) vii. This rule appears to have its origin from Problem 23 of the Clark Committee Report on Disciplinary Enforcement.

The Rule states that the certificate of conviction is "conclusive" evidence. Conclusive is defined as: "Final; forming the end; decisive; settling the question; putting an end to debate." This Rule, therefore, has concluded the evidence of the defendant's guilt. The circumstances surrounding the preparation and filing of his income tax returns are precluded from reconsideration and retrial here. This rule is much akin to the irrebuttable or conclusive presumption of law. It permits no evidence whatsoever to the contrary and binds the court, the parties and the cause to to the facts presumed. Cf. 29 Am. Jur. (2d), Evidence, Section 165, page 203.

The Rule that the conviction constitutes conclusive evidence has a solid rational basis. The defendant has been charged and tried as to these very facts. He had full opportunity to defend. In the criminal prosecution, the burden of proof was established beyond a reasonable doubt. In a disciplinary action, only clear and convincing evidence is necessary. Since in the criminal case, defendant's guilt was established beyond a reasonable doubt, certainly his guilt is thereby established by clear and convincing evidence.

Upon receipt into evidence of the certificates of conviction, the allegations of the complaint have been conclusively established. No further testimony can be considered relating to preparing and filing of the income tax returns. This court must accept the facts that Respondent has knowingly and wilfully violated Section 7206 of the Internal Revenue Code.

The Petitioner in trying this case has relied on the significance of Section 256.283(7),

and, therefore, at trial was not prepared to (nor was required to) rebut the self-serving testimony offered by Respondent and his employees. The obvious purpose of such testimony was to impeach the judgment of conviction. Such testimony was incompetent by virtue of Section 256.283(7). It was improper for the Referee to consider it in making his recommendation because to consider it is to vacate the significance of the conviction.

II. The Defendant Has Been Guilty Of Three Separate Felonies Under The Internal Revenue Code.

Defendant's violations were against Section 7206 (fraud and false statements). The gravity of his crimes can be evaluated by the penalty attaching to them. The Code provides that a person who violates this section "shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000.00 or imprisoned not more than three years, or both together with the costs of prosecution." By reviewing the penalty for the conviction one can see that the Congress considered violations of 7206 to be much more aggravated than failure to file returns. Such violations are under Section 7203. One guilty of such violations is guilty of a misdemeanor and subject to imprisonment for not more than a year.

While there may be many reasons and explanations, if not excuses, why an attorney would wilfully fail to file an income tax return and thereby be guilty of the misdemeanor, there is no valid reason, explanation or excuse for an attorney knowingly and wilfully making and subscribing a return verified by a written declaration under the penalties of perjury which the

attorney does not believe to be true and correct. The former offense can result from inaction. The latter can emanate only from a character willing to deceive, to mis-state facts and to abuse the oath. Such characteristic is not only incompatible with our tax laws but it is completely contrary to the professional standards, responsibilities and functions incumbent upon attorneys at law.

Tax convictions in Wisconsin have resulted in reprimands. These cases, however, have consistently been cases in which the attorney merely failed to file his return. Among such cases are State v. Schoendorf, 60 Wis. 2d 839, 210 N.W. 2d 447 (1973); State v. Day, 69 Wis. 2d 721, 233 N. W. 2d 448 (1975); State v. Jackson, 74 Wis. 2d 188, 246 N.W. 2d 503 (1976).

Felony tax convictions in Wisconsin have resulted in suspensions of several years. State v. Kondos, 66 Wis. 2d 119, 224 N.W. 2d 211 (1974); State v. McIntyre, 41 Wis. 2d 481, 164 N.W. 2d 235 (1969); State v. Cain, 19 Wis. 2d 50, 119 N.W. 2d 391 (1963).

In other jurisdictions persons who merely fail to file have merited suspension. In re Burrus U.S., 364 Mo. 22, 258 S.W. 2d 625 (1953) (one year); In re Kline, 156 Mont. 177, 477 P. 2d 881 (1970) (indefinite suspension); In re Queenan, 61 N.J. 597, 297 A, 2d 3 (1972) (one year suspension and until further court order); In re DePuripo, 29 A.D. 2d 461, 289 N.Y.S. 2d 378 (1968) (six months); In re Walker, 240 Ore. 65, 399 P. 2d 1015 (1966) (two years); In re DeLuca, R.I. 398 A. 2d 826 (1973) (six months); In re Knapp, 127 Vt. 222, 246 A. 2d 561 (1968) (six months); In re Greiner, 60 Wash. 2d 306, 378 P. 2d 456 (1963) (90 days); Board of State Bar Examiners v. Holland, Wyo. 494 P. 2d 196 (1972) (one year suspension, four year probation).

Other jurisdictions have imposed substantial suspensions for fraud type convictions. In re Lacob, 50 Ill. 2d 277, 278 N.E. 2d 795 (1972) (two years); In re Shavin, 40 Ill. 2d 254, 239 N.E. 2d 790 (1968) (two years); In re Baugh, 233 Ind. 424, 120 N.E. 2d 262 (1954) (nine months); In re Seijas, 52 Wash. 2d 1, 318 P. 2d 961 (1957) (disbarment).

III. More Severe Discipline Is Warranted Because Of Previous Misconduct Of Respondent And Because Of The Offenses Involved.

This respondent has previously been disciplined. State v. Eisenberg, 48 Wis. 2d 364, 180 N.W. 2d 529 (1970). The fact that an attorney was previously disciplined for unprofessional conduct must be considered by the Court in determining appropriate discipline now to be imposed. State v. McIntyre, 41 Wis. 2d 481, 164 N.W. 2d 235 (1969); State v. Aldrich, 71 Wis. 2d 206, 237 N.W. 2d 689 (1976).

In a previous disciplinary proceeding this Respondent was suspended from the practice of law on November 3, 1970. It is most significant to note that the third of the three felonies of which the Respondent has been convicted was perpetrated within six months after this Court's decision finding him guilty of unprofessional conduct in the other case.

This Court has repeatedly stated there are three recognized purposes for discipline: (1) to protect the public, (2) to rehabilitate the attorney and, (3) to provide a deterrent to other lawyers. State v. McIntyre, 41 Wis. 2d 481, 164 N.W. 2d 235 (1969); State v. Corey, 51 Wis. 2d

124, 126, 186 N.W. 2d 235 (1971); State v. Kelly, 39 Wis. 2d 171, 189, 158 N.W. 2d 554 (1968).

Our society cannot properly function without citizens abiding by our tax laws. Attorneys have a professional responsibility to uphold and abide by the law. If attorneys convicted of felonies because of their violation of tax laws suffer no severe professional consequences how can the public's respect for and compliance with such laws be maintained?

The acts of the defendant which led to his conviction involve the making of misstatements under the penalty of perjury which he does not believe to be true. Among the principal functions of lawyers is to pursue justice for clients through the purveying of truth to courts. The oath is one mainstay for finding truth. When a lawyer (under penalties of perjury) is willing to state facts believed not to be true, he shows himself as both unworthy and uncapable of presenting truth to the courts of justice.

The extend of discipline needed to rehabilitate an attorney is hard to define. Because of Respondent's previous unprofessional conduct and because at least one of these felonies was commited shortly after this Court imposed discipline on him, sever discipline appears necessary for rehabilitation. The one year suspension previously imposed did not succeed in keeping this Respondent from felonious and unprofessional conduct. Discipline far more severe is now warranted.

Every time a lawyer is convicted of a felony the entire profession suffers in the eyes of the public. Yet our advance sheets repeatedly reflect Wisconsin lawyers being disciplined for income tax

violations. Perhaps the repetition is an indication that prior discipline has not been adequate to deter fellow lawyers from like conduct.

The Referee's recommendation is inadequate. To merely fine an attorney who is convicted of violations of the fraud and false statement sections of the Internal Revenue Code will not provide the deterrent necessary to those lawyers inclined to file false returns.

CONCLUSION

> "There are many activities in the mind of the public which a professional man should not undertake because he is a professional man of trust and much is expected of him. A lawyer is a professional man twenty-four hours a day, not eight hours, five days a week." State v. Postorino, 53 Wis. 2d 412, 419, 193 N.W. 2d 1 (1972).

If lawyers are to have respect in the mind of the public, lawyers convicted of felonies must be suspended for a substantial period of time.

Respectfully submitted,

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Bar Commissioners

ARGUMENT

Petition for Writ of Certiorari is based on the fact that the Wisconsin Supreme Court's Decision and Order of November 30, 1977 completely misses the chilling implications causing fears for the future of every practicing lawyer. It would appear that before the Supreme Court imposes a 6 month's suspension on a 61 year old attorney, who has enjoyed a vigorous practice all his life, the so-called "crime" involved should be examined very carefully so as to judge its significance.

The Wisconsin Supreme Court had heretofore previously imposed a one year suspension, lengthened by the Wisconsin Bar Association into twenty-one months before Sydney M. Eisenberg was reinstated. At the time of reinstatement, the costs of reinstatement were assessed against the Bar Association for obvious reasons of procrastination on its part.

Mr. Eisenberg was suspended because the Wisconsin Supreme Court concluded he had overstepped the bounds of free speech. No clients were involved, no statutory crime was involved. No unsatisfactory attorney-client relationship was stated in any way, shape, form or manner. A Milwaukee County Judge committed suicide and although Eisenberg laborously proved with verified testimony the cause of the Judge's death had nothing whatsoever to do with Eisenberg, who in truth and fact was asked to help him and did, and the immediate act was preceeded by the misconduct of a newspaper reporter who lied to him to get his reaction, followed by the Judge shooting himself, Eisenberg became the recipient of adverse publicity by the newspaper involved.

Eisenberg's forthrightness, resulting in a Referee exonerating him, did not help him before the Wisconsin Supreme Court, which suspended Mr. Eisenberg from the law practice.

While Eisenberg was out of the office and away from the office because of his suspension, an intensive IRS investigation to seek possible criminal charges was commenced on certainly what must have been planned to be an income tax evasion case. The contents of the file of the criminal assignment were destroyed or lost by the IRS and only numerous newspaper clippings remain in said file of assignment for criminal investigation according to the testimony in the Federal Court tax case.

Eisenberg's rights of free speech in his own home, under Article I of the Amendments to the United States Constitution, as well as the abridging of privileges and equal rights provisions of the 14th Amendment of the United States Constitution for the protection of the citizens of the United States and the denial of equal protection of the laws was construed against Eisenberg by the Wisconsin Supreme Court.

In the instant issue there is no claim that anything is owed by Eisenberg for taxes. The Wisconsin Supreme Court's decision sharply insists that the fact that Eisenberg was convicted of what even the Federal Trial Court conceded was a technical type of law, is sufficient to prevent Eisenberg from earning a living in his chosen profession, if the instant decision stands.

The Wisconsin Supreme Court Decision concludes that the statement by the Federal Court Trial Judge that this is not a "tax evasion case",

is not particularly significant. The Wisconsin Supreme Court suggests the Federal Judge was simply pointing out the fact that Eisenberg was charged with 26 USC 7206. Respondent firmly believes it is more rational to conclude the statement was made by the Judge solely to point out that this was a technical violation only.

The designation that this is a "felony" case simply cannot change the facts themselves.

The Wisconsin Supreme Court did not consider in any respect the fact that the returns in question were prepared by certified public accountants. Certainly it should be important that it was the certified public accountant in the Federal Court testimony who admitted full responsibility for telling the bookkeepers to use a "cut-off date" for the years involved as part of a cash-credit hybrid sustem in effect for over 35 years and previously audited by IRS as a system without complaint.

The Court's conclusion in his finding of guilty simply placed the burden on Mr. Eisenberg of acquiescence on the return data when he signed the tax returns prepared by his certified public accountants.

If the instant case is not reversed or modified, the case will shine as a beacon telling the world that in Wisconsin the circumstances of a conviction are not important, the conviction itself is enough to destroy a reputation through a calumnious attack in the Supreme Court argument before the Wisconsin Supreme Court by counsel for the State Bar. The referee did not hear one solitary witness defame Eisenberg in any way, according to the transcript.

Constitutional and elementary justice calls for reconsideration in this case.

The Referee, was an experienced Judge, who is highly respected and who filed a report of 38 pages. Briefs were submitted by both sides. Judge Morrison stated in his decision that the tax decision was now conclusive and could not be attacked; however Judge Morrison obviously read the Findings by Judge Wood who tried the case without a jury and who stated: "This is not a tax evasion case. This is a false statement case which the Congress has considered to be less, and I do, too; and I think, under these circumstances, taking into consideration many of the things the defendant himself has said, it is not a case for any time. So it is going to be a matter of a fine." (Page 3, Defendant's Memorandum, September 22, 1976.) "I don't think Mr. Eisenberg needs any supervision at all." (Page 4 of above.)

The facts of the tax case are clear. Mr. Eisenberg could not have known of the tax consequences with respect to the making out of his returns because his bookkeepers were at least 6 months or more behind on their entries and returns were all filed legally within time limits because extensions were necessary.

The Wisconsin Supreme Court Decision has obviously reached a conclusion never anticipated by the Federal Court. There is nothing in any statute or any case law which holds that a mere conviction alone on a case, which has nothing whatsoever to do with the practice of law, should conclusively bar an experienced trial lawyer from practicing at his chosen profession. The conclusion that mitigating circumstances do not include the type of conviction and reason for conviction

is incredible.

The previous suspension referred to was based on no crime, it was an interpretation of free speech at the most and had nothing whatsoever to do with the tax matter except that Mr. Eisenberg was compelled to remove from his office and leave the bookkeeping to others which ultimately caused the tax case and the conviction involved.

If the tax conviction called for a fine only, the Wisconsin Supreme Court should certainly go no further and should certainly be advised and consider the tax court's analysis upon hearing the evidence, as he did without a jury.

The Cain case in 19 Wis. (2d) 50, involved a situation where Judge Morrison as referee, took testimony at Sandstone Penitentiary where Mr. Cain was incarcerated. The Wisconsin Supreme Court reduced his period of suspension to 16 months instead of the 2 years recommended by Judge Morrison.

In the previous Eisenberg suspension, the Wisconsin Supreme Court disregarded Referee Young's exoneration of Mr. Eisenberg. The Wisconsin Supreme Court imposed a one year suspension which lengthened into 21 months, although Mr. Eisenberg promptly applied for reinstatement. The Wisconsin Supreme Court then charged the cost of reinstatement to the Wisconsin State Bar, obviously because of the vengeful treatment of Mr. Eisenberg by the Wisconsin State Bar.

Justice Hallows, in a dissenting opinion as part of the Roggensack case reported in 19 Wis. (2d) 38, stated as follows:

"The majority opinion holds in effect this court has power to revoke or suspend a license of a member of the bar for acts in his private life which do not involve unprofessional conduct or moral turpitude and overrules language in State v. McKinnon (1953), 263 Wis. 413, 416, 57 N.W. (2d) 404, that "it is not within the scope of this court's authority to impose discipline for conduct which has no relation to his duties and obligations as a lawyer, where the request for disciplinary action is based upon acts involving no moral turpitude." It was pointed out in State v. McCarthy (1949), 255 Wis. 234, at page 246, 38 N.W. (2d) 679, that sec. 256.28(8), Stats., provides for a special proceeding relating to the suspension and disbarment of attorneys and, under sec. 256.28(7), a lawyer found guilty of unprofessional conduct or an act involving moral turpitude may be suspended or disbarred from practice, but no other penalty is provided.

The majority opinion's expression of this court's power is apparently based upon the inherent power of this court to discipline and disbar attorneys. Such power is recognized in In re Stolen (1927), 193 Wis. 602, 214 N.W. 379. But inherent power is not unlimited or founded upon ipse dixit. By overruling the language of the McKinnon Case, the majority opinion leaves a clear implication that regardless of the statute this court

has the power and jurisdiction to disbar or suspend an attorney for acts not amounting to unprofessional conduct or not involving moral turpitude. The majority opinion expresses a dangerous doctrine of inherent power and only softens its impact by stating as a general rule it will not exercise such power but there may be exceptions.

I quite agree that on the instant facts the defendant should be censured for his conduct which did not involve unprofessional conduct as defined in sec. 256.29 (2), Stats., or moral turpitude. But I have dificulty with the concept that every violation of the law is unprofessional conduct because the Canons of Ethics provide an attorney should obey the law. I do not think this court's inherent power goes to the extent of disbarring or suspending an attorney for his private life or his morals which do not amount to a breach of professional conduct or involve moral turpitude. I agree with what was said in the case of In re Richter (1925), 187 Wis. 490, 504, 204 N.W. 492: "This court does not sit in this or any other case as a court of inquisition to search out the private life and censor the morals of the attorneys who are its officers." I must respectfully dissent.

I am authorized to state Mr. Justice Dieterich joins in this dissent."

If lengthening the Eisenberg suspension from 12 months to 21 months meant that Eisenberg was

wrongfully deprived of the right to practice law for 9 months, subtracting the 6 months from the 9 months, leaves Eisenberg with a credit of 3 months, and the instant suspension of 6 months should be cancelled.

The instant case involves a tax situation wherein most lawyers cannot make out their own returns and Mr. Eisenberg did not make out his own return; instead, the record proves that two certified public accounting firms conscientiously made out the returns from records coming from bookkeepers. Mr. Eisenberg's returns were filed on time and Judge Morrison certainly construed the law properly when he made the following recommendation after considering the Roggensack and Cain cases as follows:

"In reviewing practically all of the Wisconsin cases affecting income tax returns, I have found no case exactly comparable. There are two, however, which have some bearing.

In State vs. Roggensack, 19 Wis. (2), 38, the defendant had properly and accurately filed his income tax returns each year; but because in some years he had found himself in financial straits, he filed late and submitted to the statutory fine. At that time the case of State vs. McKinnon (1953) 263 Wis. 413, 57 N.W. (2d) 404, had not ever been reversed so that it was necessary to find a defendant guilty of moral turpitude. In the Roggensack case our Court overruled the McKinnon case and held that the defendant was subject to discipline because he had not paid the tax on time, and that it was so unprofessional for an

attorney to be owing an income tax debt that it merits disciplinary action.

In the second case of Wisconsin vs. Cain, 19 Wis. (2d) 50, the defendant and his lawyer wife kept entirely inadequate books and approximated the profits derived from their many important cases. The practice was so sloven and their conclusions so advantageous to themselves that it was not difficult for the court, both Federal and this Court, to find the defendant guilty of wilful and intentional evasion of paying their just and legal taxes.

I call attention to the case of United States vs. Pechenik, 236 F.2d, 844 (3rd. Cir. 1956). This case has been cited by defendant Eisenberg in support of his appeal of his conviction in his recent Federal case. In that case, the defendant left his returns to his bookkeeper and accountant, which was practically the situation with defendant Eisenberg. He was indicted on the theory that he wilfully understood his corporation tax by treating capital expenditures as operating expenses. The verdict was reversed in the Court of Appeals, because the evidence did not support the verdict. The Court found in effect that the defendant had no part in the errors. The Court implied that to find the defendant guilty, it must be found that the defendant participated in and directed or knew the books were kept incorrectly. (Defendant's motion in Federal Court for "judgment of acquittal notwithstanding the verdict." Page 9.)

Actually, we may disregard the foregoing language, since in the case at bar we rely on the verdict of guilty rendered by the jury in Federal Court, and later confirmed by Judge Wood. Such verdict is now conclusive and may not now be attacked. 256.283(7) Wis. Stats.

For the benefit of those who are required to file income tax reports, particularly those of the legal profession, I think it is fortunate that this present case has arisen at this time so that we may be clearly advised by this Court what is the real responsibility of a taxpayer who relies almost completely on the advice and labor of certified public accountants and presumably competent bookkeepers.

> As perhaps never before do we find so many taxpayers who depend upon the above experts to make out their returns. To what extent may the taxpayer safely rely on returns so made out? To what degree should the taxpayer be held responsible even though he may have little knowledge of the law and the requirements of a proper tax return? Income tax laws have become increasingly intricate and more difficult to understand. The finality of this case should well operate as a safe guide for the present and future taxpayers."

If the 14th Amendment of the United States Constitution is to mean anything, it should certainly be construed as protecting the right to make a living when the protection of the public is in no way involved. The Roggensack case which

sets up new standards overruling the previous moral turpitude requirements, states as follows:

> "Canon 29 of the Canons of Professional Ethics of the American Bar Association states that a lawyer "should strive at all times to uphold the honor and to maintain the dignity of the profession..."
>
> We do not wish to imply that every violation of law by an attorney will subject him to discipline. As a general rule, before such violation will be a ground for discipline it must entail moral turpitude as defined in State vs. McCarthy (1949), 255 Wis. 234, 249, 38 N.W. (2d)679. Nevertheless, we deem intentional violation of tax laws, even though without intent to defraud the government, an exception to this general rule because in our opinion such intentional violation constitutes unprofessional conduct.
>
> This brings us to the question, what discipline should be imposed upon defendant? This question should be considered with the goal of protecting the public in mind. See State v. Barto (1930), 202 Wis. 329, 345, 232 N.W. 553. Punishment of an offending attorney is not the objective of disciplinary proceedings. State v. Kern (1930), 203 Wis. 178, 181, 233 N.W. 629. Primary consideration should be given to the question of whether there is a likelihood, if any discipline is imposed short of suspension or disbarment, of the attorney's engaging in unprofessional conduct in the future. State v Markey (1951), 259 Wis. 527, 542, 49 N.W. (2d) 437; State v. McCarthy, supra,

at page 250; and State v. Kern, supra at page 183.

The Associated Press on July 13, 1977 reported the following interviews, which story was printed in the morning daily Milwaukee newspaper on said date:

> "Tax Simply, 3 Implore" Washington D.C. - AP - "Three of the nation's former top tax collectors implored Congress Tuesday to take pity on citizens struggling with a complex tax code and baffling return forms"
>
> "They can only comply with a law they can understand," Sheldon S. Cohen, Internal Revenue Commissioner in the Johnson administration told a joint economic subcommittee."
>
> Donald C. Alexander, IRS commissioner in the Ford administration, said the 1,000 page code contains "words of such a type and structured in such a way as to defy the understanding of all but the most skilled, dedicated and experienced tax practitioners." "Making our system simple and understandable is more important than trying to attain every social and economic objective perceived at the time to be worthwhile," he said.
>
> Mortimer Caplin, commissioner in the Kennedy administration, said Congress should be willing to "accept some tax leakage as the price of a workable tax system."
>
> Not only have repeated additions to the code made the income tax return fomidable, he said, but the energy tax bill now going

> through Congress threatens to make it worse.
>
> He singled out the proposal for giving a tax credit for insulating houses.
>
> "When I hear of a proposed insulation credit, I just shudder as a former tax administrator," Caplin said. "I see a proliferation of attic playrooms in the name of insulation."
>
> Next, Caplin continues, he sees an army of Internal Revenue Service agents scrambling up stairways to check.
>
> Sen. Lloyd Bentsen (D-Tex.) indicated sympathy. "I have a law degree and I spent 16 years in business," Bentsen said, "and I wouldn't dare to try to make out my own tax return..."

We urge the United States Supreme Court to observe the reality of the instant situation, which calls for fair play to Mr. Eisenberg, as well as consideration for the public.

The Wisconsin Supreme Court clearly stated in State v. Cain, 19 Wis. (2d) 50, at page 53:

> "The extent of discipline required by the particular facts of each case is highly discretionary."

Mr. Eisenberg was not in his office and was not practicing law through much of the period involved in the tax accounting case. A person not practicing law should not be held responsible for bookkeeping occurring while not practicing law. The tax returns conviction followed book-

keeping which was performed during the period when Mr. Eisenberg was not practicing law, nor in the law office. Facts therefore can involve no unprofessional conduct during that period. The Wisconsin Supreme Court decision should be reversed and Mr. Eisenberg permitted to practice his chosen profession. The United States did not lose one cent because his accountants used the same hybrid system in effect for many years. The variations in amounts reported resulted only from the United States tax experts claiming "cutoff dates" were improper with the net results simply causing "rollovers" so that the credits were due the following year. Actually Mr. Eisenberg overpaid because his accountants did not list many legally deductible expenses. These facts should properly be considered as mitigating if State v. Cain is now the law of this state, 19 Wis. (2d) 50.

The conviction may be conclusive insofar as proof is concerned. The facts of the case, when they are a matter of record, are certainly to be considered when they are mitigating, as well as when they must be considered as a factor against the taxpayer and any other person who is unfortunate enought to be faced with a similar situation. Sen. Bentsen publicly stated his feelings in the situation.

Any lawyer or in truth taxpayer in the United States could be accused of signing a false return if mistakes can be accumulated and a trial court, with or without a jury, decides that each mistake standing alone is explainable but several together constitute circumstantial evidence. The conviction alone must be weighed with all the other circumstances when taking away a man's right to make a living.

Is the taxpayer to be relegated to the ranks of the unemployed without even unemployment insurance under these circumstances over which he had no control?

The Wisconsin Bar has a duty to protect the rights of lawyers who are outspoken, fearless, devoted to help their troubled clients and help spread peace where there is anger. Mr. Eisenberg at all times stated that when Judge Krueger came to him for help, he tried to help Judge Krueger. He was in no position to audit the work of certified public accountants. The tax conviction was amply covered in the decision of the Federal Judge who heard the case and which decision even now is subject to review by a higher court.

In Mr. Bichler's Petitioner's Trial Memoranda he stated as follows:

ISSUES

In his answer, the respondent makes various allegations which appear to be for the purposes of contradicting the findings and judgment in the criminal action. All such allegations are irrelevant to these proceedings for the reason that Section 256.283 (7) provides as follows:

> "Criminal conviction constitutes conclusive proof of guilt. In any disciplinary proceeding instituted against an attorney based on a conviction, the certificate of his conviction shall be conclusive evidence of his guilt of the crime for which he has been convicted."

The foregoing section was created by Supreme

Court Rule and became effective January 12, 1971, 48 Wis. (2d) vii.

The Rule states that the certificate of conviction is "conclusive" evidence. Conclusive is defined as: "Final; forming the end. Decisive; settling the question; putting an end to debate." This Rule, therefore, has concluded the evidence of the defendant's guilt. The circumstances surrounding the preparation and filing of his income tax returns are precluded from reconsideration and retrial here. This rule is much akin to the irrebuttable or conclusive presumption of law. It permits no evidence whatsoever to the contrary and binds the court, the parties, and the cause to the facts presumed. Cf. 29 Am.Jur. (2d), Evidence, Section 165, page 203.

The Rule that the conviction constitutes conclusive evidence has a solid rational basis. The defendant has been charged and tried as to these very facts. He had full opportunity to defend. In the criminal prosecution, the burden of proof was established beyond a reasonable doubt. In a disciplinary action, only clear and convincing evidence is necessary. Since in the criminal case, defendant's guilt was established beyond a reasonable doubt, certainly his guilt is thereby established by clear and convincing evidence.

The petitioner, therefore, respectfully submits that upon receipt of the certificate of conviction, the allegations of the complaint will have been conclusively established and that no further testimony relating to preparing and filing of income tax returns will be admissible.

Certain tax convictions in Wisconsin have resulted in merely a reprimand. These have consistently been cases in which the attorney for some reason or other failed to file his return. Among such cases are State v. Schoendorf (1973), 60 Wis. (2d) 309, 210 N.W. (2d) 447; State v. Day (1975), 69 Wis. (2d) 721, 233 N.W. (2d) 448; State v. Jackson (1976), 74 Wis. (2d) 188. The crime here is much more aggravated.

The crimes of which this defendant has been convicted are more akin to cases resulting in suspensions of several years. State v. Kondos (1974), 66 Wis. (2d) 119; 224 N.W. (2d) 211; State v. MacIntyre (1969), 41 Wis. (2d) 481, 164 N.W. (2d) 235; State v. Cain (1963), 19 Wis. (2d) 50, 119 N.W. (2d) 391.

Conclusion

Defendant is guilty of all the charges made. Because of the criminal court finding of his guilt beyond a reasonable doubt, he cannot now challenge his guilt. The sole issue is what discipline should be imposed. Because the offense is most severe and because at least one of the felonies was committed during the period he was being disciplined in another case, most severe discipline must now be imposed.

ARGUMENT I

The Reply Brief of Mr. Bichler, Counsel for the Board of State Bar Commissioners has prejudiced the Wisconsin Supreme Court with downright deception and absolute untruthfulness.

In this proceeding, complaints of clients are not relevant. One witness testified that she did not know of any complaints. On cross examination, it was established she had no basis for her statement. Because this complaint relates solely to tax convictions, the question of complaints on other matters would not be properly admissible had they been offered by the State. It ill behooves the Respondent to claim that there is silence on the part of the State in this regard. If the Respondent is contending that such complaints are properly admissible, the State requests that the Referee reopen the hearing so that the clamor of the multitude of complainants against this attorney for his professional conduct might be heard. An attorney is an officer of the court charged with the administration of law. Attorneys have special duties to uphold the tax law. This Respondent has abused, perverted and bastardized the oath by his knowingly filing false tax returns. He has done so for his personal gain and to the disrepute of the legal profession and himself as a lawyer.

On the basis of the testimony of John Zerbel of the Zerbel CPA firm, the record shows the Zerbel firm was retained by Mr. Eisenberg to make an independent audit to determine what the problem was with reference to IRS since he was unaware of the problem and IRS would not state during the accounting portion of the case what the problem was. It is clear that the auditing was terminated abruptly and changed to a criminal action when Mr. Eisenberg was made the object of a selective prosecution in 1968 when the Tucker murder trial took place and the "Krueger" cases started in July and August.

This selective prosecution was admitted in the tax trial although the prosecution claimed that their file had disappeared. The circumstances involve mitigation of the conviction and the obvious has to be considered before any attempt is made to suspend the Eisenberg license.

It is respectfully submitted there is no foundation in fact insinuating that Mr. Zerbel's work for Mr. Eisenberg constituted "a substantial portion of his income."

The Roggensack, Cain and McIntyre cases were absolutely and completely different from the instant one. Mr. Eisenberg concedingly relied absolutely on the work of the employees in charge of his books and the CPAs and the question of the guilt certainly in this case has to be considered in the light of what actually happened. In the court hearing, the tax case drew an inference only that Mr. Eisenberg should have known of any errors or methods of bookkeeping practiced by the CPAs, it is certainly significant that the CPAs were never charged with any offense although the duty was theirs to make sure that the returns were absolutely accurate. They signed the return.

In the instant case the conviction itself has to be considered with respect to the statements of the trial court who said that Mr. Eisenberg did not need any rehabilitation, imposed only a fine, as per Appendix. There was no probation imposed and certainly no jail sentence, only more or less a warning to make sure that Mr. Eisenberg would pay more attention to the filing of his returns. Counsel for the Petitioner seeks to go far beyond the Tax Trial Judge's reaction and findings. Counsel for

Petitioner attached a copy of the report of the Clark Committee. The Supreme Court, and in fact all other courts, have been very careful not to deprive a man of his profession where there are mitigating circumstances. United States Court of Appeals for the Second Circuit, Docket No. 75-1428, UNITED STATES OF AMERICA against VITO M. PASTORE.

There is no foundation for the Wisconsin Board of Bar Commissioner Counsel's statement referring to "The clamor of complaints against Mr. Eisenberg", and, in fact, Mr. Eisenberg could have produced as witnesses the many thousands of people who were well satisfied with his services and consider him to be an excellent attorney, a competent and effective trial lawyer and a credit to his profession. The defendant has neither abused, perverted nor "bastardized" his oath by signing income tax returns prepared by the CPAs and counsel for the petitioner has used intemperate language. Mr. Eisenberg did not sign a return for personal gain or any other reason and the record is clear that if he had followed the IRS rulings, he would have paid less money and not more. Defendant never improperly took a "nickel" from anyone and petitioner's counsel's statement is calumnious, derogatory and unfair. Mr. Eisenberg's decency and compassion is well known throughout the State and nothing in Mr. Bichler's letter can change those facts. Mr. Bichler's remarks are simply unjust and appear to have an ulterior motive, strictly slanderous.

The Recommendation in the proposed report cites a "Problem 23", which specifically provides: "The only issue to be determined in the disciplinary proceeding is whether the crime

warrants discipline and, if so, the extent of discipline to be imposed, the attorney may offer evidence of mitigating circumstances not inconsistent with the essential elements of the crime as determined by the statute defining the crime."

The evidence before the Referee conclusively establishes that there was a tremendous multiplicity of transactions in which Mr. Eisenberg was involved; that every transaction was documented and nothing whatsoever was hidden from anyone. The inference by the trial court that Mr. Eisenberg should have known of the transactions simply sidesteps the fact that any experienced trial lawyer, experienced as Mr. Eisenberg was, as such, would have to concentrate intensively on his trial work. He would have every right to rely on a large staff of bookkeepers and CPAs, particularly where Mr. Eisenberg, as he testified, was engaged in a law partnership with others, and had a right to trust them without checking personally on everyone handling the records in question. He would have no reason to suspect any wrongdoing and had nothing to gain from any mistakes which may have been made. The legal bookkeeper for the firm explained that she alone handled the legal records and Mr. Eisenberg had nothing whatsoever to do with the records for the firm.

The Federal Court only concluded there was an inference Mr. Eisenberg should have known of mistakes. Nothing changes the evidence proving complete mitigation. The previous accountants have been replaced. What more can Mr. Eisenberg do?

The law firm and building management firm had over 95 employees. Book entries were endless.

ARGUMENT II

This reply to the brief of Robert H. Bichler, as attorney for Petitioner, Board of State Bar Commissioners, is brought to point out to the Supreme Court that nothing in the response of the Motion for Re-hearing disproves one word contained in the Motion for Re-hearing.

There were not three convictions. There were three counts in one case which alleged that Mr. Eisenberg signed income tax returns which were prepared for him by two Certified Public Accountants. He did not prepare the income tax returns. Mr. Bichler has made statements which he himself describes as "calumnious," but further states "What the Bar needs is more such calumny." To heap the vicious abuse upon respondent as exhibited in Mr. Bichler's brief is an insult to the entire Bar. If the law is such that lawyers cannot rely on Certified Public Accountants to prepare income tax returns, as Judge Morrison so amply inferred, the entire Bar must have cause for alarm; not at Mr. Eisenberg, but rather at the system which places a terrible burden upon lawyers.

Mr. Bichler's reply brief is highly insulting and scurrilous. Justice cannot prevail when reason is lost.

Mr. Eisenberg has served well many hundreds of thousands of people during the many years of his practice because he was both fearless and compassionate. He deserves every consideration. If he depended upon other people and was not an accountant, his right to practice law is amply justified.

The truth is that the Federal Court made no finding that anything was due the I.R.S. In innumerable other cases the Supreme Court reprimanded attorneys who never filed income tax returns at all, nor paid any taxes due. Mr. Eisenberg had Certified Public Accountants prepare his returns, file them and paid whatever was due, and owes nothing.

An examination of Petitioner's Brief In Response is truly alarming to every member of the Bar and Bench. I.R.S. can now claim an accounting mistake, the Court can find that the taxpayer should have known of the mistake, and even though there is nothing due, and the taxpayer did not hide any money, conceal any records or "doctor" anything whatsoever, any member of the Bench or Bar can be suspended from practicing his profession even though he spent his entire lifetime at it.

This situation, with Mr. Eisenberg as a target, can only be described as abominable to him and everyone else who knows the circumstances, as well as the public at large.

The fact that this is not an income tax evasion case and that nothing is due the Government, has clearly been overlooked.

The suspension dates back to November, 1977. It should now be removed.

Respectfully submitted,

RAY T. McCANN
Attorney for Sydney M. Eisenberg

SUMMARY

Petitioner is reproducing herein the entire Brief of Counsel for the Bar Commissioners in response to Motion for Rehearing. Speaking for the Wisconsin Board of Bar Commissioners, which was appointed by the Wisconsin Supreme Court his Brief is filled with the most scurrilous, calumnious sheer "hogwash" he could possibly include in what should have been a dignified presentation.

He threw caution and decency to the winds, because he knew he would be supported by the press. Even the Wisconsin Supreme Court had enough conscience to realize the lengthening of the twelve month suspension to twenty-one months was not a problem caused by Petitioner. They finally ordered him reinstated with the costs charged to the Wisconsin State Bar Association, whose large membership includes Wisconsin's largest law firm, which just happens to be counsel for the Milwaukee Journal and which was reported by the Milwaukee Journal last week to have obtained a court modification of its personal property tax involving rental of four floors at the First Wisconsin Bank Building, Wisconsin's largest bank, for $220,000 annually for each of four floors, and $1,600,000 worth of improvements.

The same law firm, then called Foley and Lardner, represented the Journal and its Sentinel throughout the many months of the hearings involving the Petitioner's first suspension before the Referee who cleared Petitioner, although same was reversed by the Wisconsin Supreme Court for reasons which most lawyers never did nor now do understand. In the second suspension, the Journal printed Bichler's worst insults decrying Eisenberg's truthfulness.

A petition for certiorari to the United States Supreme Court on such suspension was denied.

But that suspension hearing followed the Tucker case explained in the instant case Petition. And in the Tucker case it was clearly proven by the Eisenberg lawyers that the police burned down to the ground the Tucker building containing a Mrs. Moses who was burned to death in the process.

The Journal overlooked the fact that a very much alive woman was burned to death by police shooting tear gas into the building to get out the black Mr. Tucker, who never intended to shoot any police officers at all. Plainclothes people were shooting at him so he shot back and was cleared of first degree murder in this community brought to a frenzy by the Milwaukee Journal, Milwaukee Sentinel, WTMJ-AM and WTMJ-FM, WTMJ-TV who were selling papers and viewers like crazy.

But let us not overlook the gratitude of the Milwaukee Police Department to the Journal for virtually ignoring the burning to death of the very much alive Mrs. Moses.

No wonder Petitioner and his family's lives were threatened, the safe in his office broken open; he was accused of bringing about a Judge's death, suspended from the law practice, his bookkeepers and accountants bombarded by IRS accountants and IRS Intelligence and he was selectively prosecuted. Anyone can see the Milwaukee police get free Sunday Journal papers at the Milwaukee Journal main building.

Attorney Robert H. Bichler, Attorney for the State Board of Bar Commissioners says "perjury type convictions violate the lawyer and render

him unfit to continue in the practice of law. If it is 'calumnious' to so argue, then we respectfully submit that what the bar needs is more such calumny."

Petitioner now submits that when the letter from the C.P.A. making out the tax return which was generally sent over an hour or two before the deadline for filing for signature on the many pages, any taxpayer is justified in accepting the word of his C.P.A. that the return is in order. When the books and records are complete and nothing is hidden or kept from the records by the taxpayer, he has no choice but to accept the judgment and word of his C.P.A.'s.

If U.S. Senators, Judges, governors, former IRS administrators all agree that an individual with complex business activities be expected to make out his own return, why should Petitioner be singled out and held responsible even if there were no errors or mistakes, which in this case were generally causing expenses to be overlooked and income charged to Petitioner which he didn't owe.

Were the reviewers of this case afraid to face the truth and clear Petitioner? Is the Solicitor General afraid of some unknown power? Petitioner hopes and prays that someone, somewhere will stand next to him, tall and unafraid to clear a victim of an American holocaust.

The reply to Attorney Bichler's brief entitled "Respondent's Reply to Petitioner's Brief is also being printed herein, because Attorney Ray T. McCann is a former president of the Milwaukee Bar Association and also former president of the Wisconsin State Bar Association. His brief

was returned by the Wisconsin Supreme Court for the claimed reason that the Wisconsin Supreme Court rules do not permit a reply to a brief on a motion for reconsideration. But it was sent, it makes sense, it corrects erroneous statements by Attorney Bichler and it is reason enough for the reversal and dismissal of this case sought herein.

How in the world could Petitioner try cases in one court after the other and then do any bookkeeping, which he never had done? See article in Milwaukee Sentinel of March 21, 1967, which stated as follows:

JUDGES CLAIM BUSY LAWYERS SLOW COURTS
By William Janz

A proposal will be made to set up a court system which would indicate whether certain attorneys have so many cases pending in civil court that it sometimes prohibits courts from operating effectively.

Some judges have said that the court calendar here is in excellent shape but that a few attorneys, one in particular, have so many cases pending in various courts that it is difficult to set a case for trial involving them.

Francix X. McCormack, clerk of courts, said he would recommend in a letter to the county board of judges that each attorney be assigned a number. McCormack's office could then tell how many cases every attorney has pending and where.

Circuit Judge William I. O'Neill said he would recommend to the county board of judges:

* That an attorney be permitted only one adjournment when a case is ready for trial.

* That the board establish a certain number of cases, possibly 50, as a maximum that an attorney could have pending here.

Atty. Sydney M. Eisenberg, one of the busiest trial attorneys, said, "This is ridiculous. The courts are succumbing to the wishes of the wealthy defense law firms, the insurance companies, that want to eliminate capable plaintiff law firms.

"If the judges do their bidding, something may have to be decided in the elections. What business is it of anyone's how many cases I try? It's none of anyone's damn business."

When Eisenberg is trying a case in one court, sometimes several other courts will call the court that Eisenberg is in and ask that he report immediately after his case is finished. Some courts reportedly have set up five or more of Eisenberg's cases in a row and once he is in court, the judge doesn't let him go until the cases are finished.

However, one judge recently said that a client has the right to choose

his own attorney, no matter how busy that attorney is. And he said that person also has the right to have his day in court even if he and the court have to wait a long time because the attorney is busy."

In another issue of The Sentinel by the same reporter:

"The law firm of Eisenberg & Kletzke is involved in 367 civil cases that are pending in circuit and county courts here, a report showed Wednesday.

***

Eisenberg has five attorneys in his firm, but two of them are assigned to divorce and criminal work which was not considered in the report.

The firm represents plaintiffs in 325 cases, more than any firm in the county. The report also showed that the firm was not ready for trial in 263 of the 357 pending cases.

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One judge said, "You can't tell anyone they can't go to Eisenberg."

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Bichler's Brief:

STATE OF WISCONSIN

IN SUPREME COURT

No. 76-108-D

In The Matter Of The Disciplinary Proceedings Against

SYDNEY M. EISENBERG,
Attorney at Law.

BRIEF OF PETITIONER IN RESPONSE TO MOTION FOR REHEARING

ARGUMENT

The petitioner makes response to the brief of respondent on his motion for rehearing not because the brief appears to contain any merit, but because silence by petitioner might be construed by respondent as an acknowledgment that his brief has merit or such silence might be construed by respondent as acquiescence of petitioner to the charges made in the brief.

Since most of the matters raised in the brief have been ably answered in this court's original decision, petitioner in this reply will attempt to be brief without being unduly curt.

Attorney Eisenberg stands convicted (by proof beyond a reasonable doubt) of thrice wil-

fully and knowingly verifying by written declaration under penalty of perjury matters he believed not to be true and correct. It will not be harmful to the bench, bar or public if lawyers are "chilled" or rendered fearful from indulging in such conduct.

What is most frightful to the interest of the bench, bar and public is the almost paranoid persistent blindness of respondent to the wrongfulness of his conduct. Unless respondent recognizes his wrong (which he refuses to do), there can be no hope that he will right his ways. His rehabilitation is hopeless. To reinstate him at any time will be perilous to the bench, bar and public.

Respondent has not only blinded himself to the perjurous nature of his conduct, but he also now criticizes and contradicts this Court's decision in respondent's previous disciplinary case. Respondent has apparently also blinded himself to his misconduct presented there.

He attempts to lay at the feet of his bookkeepers and accountants the responsibility for his pattern of manipulation in his financial activities.

He is blind to the function of the lawyer who fails to see that perjury type convictions violate the lawyer and render him unfit to continue in the practice of law. If it is "calumnious" to so argue, then we respectfully submit that what the bar needs is more such calumny.

It is this court's responsibility (and it was not [illegible]st of the federal court) to impose professional discipline on Mr. Eisenberg for his

perjurous actions.

The reasons Mr. Eisenberg after his previous suspension was not reinstated for a period of 21 months are not of record here. But if facts outside the record are going to be considered in this argument for rehearing, then it is only fair to point out that the delay was principally a problem caused by Mr. Eisenberg. For him to now call the delay vengeful treatment by the State Bar is for him to again distort facts.

In speaking of the legal profession, Justice Frankfurter has stated:

> "From a profession charged with such responsibilities, there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that has, throughout centuries been compendiously described as 'oral character'." Schware v. Board of Bar Examiners 353 US 232, 247, 1 Law. Ed. 2d 796, 7 S. Ct. 752.

Mr. Eisenberg does have his constitutional right to make his living. If he chooses, however, to make it within the legal profession, he must possess the quality of truth-speaking. His three felony convictions prove beyond reasonable doubt three instances of his lack of the quality of truth-speaking.

If rehearing is merited on any issue, it is merited solely on the issues as to whether or not the six month suspension is adequate in view of

the respondent's either inability or persistent refusal to recognize professional misconduct.

Respectfully submitted,

ROBERT H. BICHLER

Attorney for Petitioner,
State Board of Bar
Commissioners

McCann's Brief, refused by the Wisconsin Supreme Court:

STATE OF WISCONSIN
IN SUPREME COURT

In the Matter of the Disciplinary Proceedings Against

SYDNEY M. EISENBERG, No. 76-108-D

Attorney at Law.

RESPONDENT'S REPLY TO PETITIONER'S BRIEF.

At the outset, it is to be noted that nothing in the Petitioner's Reply Brief disputes anything contained in the brief of Petitioner in support of motion for rehearing. Furthermore, adjectives, no matter how descriptive, cannot change facts. There were not three convictions; there were three counts in a single indictment.

The tax returns in question were prepared by certified public accountants and not personally by the taxpayer. On page 2 of Petitioner's Brief, in response to a motion for rehearing is found the following statement:

> If it is "calumnious" to so argue, then we respectfully submit that what the bar needs is more such calumny.

If this statement is sarcasm, we submit it has no appropriate place in this matter. If lawyers cannot rely on certified public accountants to prepare

tax returns, as Judge Morrison so aptly inferred, there indeed is a caveat to all attorneys that reliance upon accountants may result in criminal convictions.

The record in this case shows that, notwithstanding the numerous clients that Mr. Eisenberg had represented, none made any complaint about Lawyer/Client relationship.

As the Federal Court stated, it was not a "tax evasion" case. There was no money due and owing to the Government. There was no claim in the criminal action that the therein named defendant concealed any money due the Government nor that he altered any records. Any taxpayer under the same circumstances, if such taxpayer were a selected target for the I.R.S. as was Mr. Eisenberg, any member of the Bar could be suspended from practicing his profession.

More than two months of the suspension has already expired and we respectfully submit that the suspension should now be terminated forthwith.

Respectfully Submitted,

RAY T. McCANN
Attorney for Respondent.

CONCLUSION

Petitioner, in 1968, 1969, and 1970, was a member of a law office including a number of lawyers, who were practicing law. Petitioner also was the owner of a number of "high rise" and other properties, some of which were individually owned, and some in solely owned corporations. Petitioner was involved in cases in various parts of the United States, labor counsel for numerous unions, Honorary Consul to a foreign country; he was involved in the operation management and repairs of over five hundred apartments and an art and craft center as part of the realty ownership.

Petitioner was publicly, through newspapers, acknowledged as being involved in the largest plaintiff's trial practice in the State of Wisconsin, often being escorted by bailiffs from court to court, frequently commencing new trials without any rest. (See appendix supplement)

Petitioner retained, on behalf of all his income tax and bookkeeping activities, no less than five to ten bookkeepers and two certified public accountant firms, in which he had complete confidence, and signed voluminous income tax returns prepared by the two certified public accountant firms. Petitioner had a right to and did rely completely upon the skill and integrity of the two certified public accountants who prepared the returns in question. All records were available at all times for everyone to see.

Petitioner further asserts that none of Petitioner's funds, at any time, were merged with client's funds, nor were clients involved in any way, shape, form or manner in the tax

problem which are the subject of this disciplinary action.

Petitioner asserts, further, that he was required to stay away from the law office during various periods of the thirty-six months involved, and that it would have in any event, been physically impossible for him to audit the records which he had every right to believe the bookkeepers were recording and the certified public accountants were preparing for tax returns.

Petitioner asserts that the IRS admittedly selected Petitioner as a target in 1968, following a tremendous amount of publicity which resulted from Petitioner's law firm defending one Ora Tucker, who was accused of murder involving police officers and the riots which took place in Milwaukee.

Petitioner further asserts that immediately following the culmination of the Tucker case, a black man who was accused of murder, and the acquittal of Tucker in the murder portions of the case in 1968, a course of harassment threatening the life of Petitioner followed, as well as attacks upon Petitioner. The Petitioner then became involved in a disciplinary proceeding during the years involved which consumed years of attention and caused great aggravation.

Petitioner further asserts that it was virtually impossible for him, under the circumstances, to get involved in bookkeeping practices.

Petitioner further asserts that he was indicted for signing a false return, although the

IRS had spent many years in constant checking to determine whether Petitioner had, in fact, evaded any income taxes. IRS obviously found no tax evasion and so decided to proceed on a false return basis.

Petitioner asserts further, that such indictment by the IRS came only when the IRS concluded that there was, in fact, no income tax evasion that they could ever find, in spite of the many thousands of hours and years they spent checking, during which time Petitioner had provided an office and space for the IRS to check the records, with complete access to all the many thousands of transactions and records in which Petitioner was involved. Not one record was concealed or altered.

Petitioner further asserts that the original government indictment was originally dismissed on its own motion by the United States Attorney, for the reason that it was claimed to be erroneous, and that the IRS subsequently again indicted, claiming false returns in the following areas without consideration of truth:

1. That there had been an overlapping of checks paid for expenses, although Petitioner was given to understand by his bookkeepers and accountants that expenses were to be charged to the years incurred, rather than when the checks were actually delivered, and that said system had been in operation for years, Petitioner understanding that there could be no loss to the IRS because of "roll-overs" would even out the situation.

2. That checks issued to an attorney for

payment of his bill did not correspond to invoices for the reason that periodic payments were made by the bookkeeper who had complete control of the account and she sent checks when money was available; the bills and payments at all times were available for audit.

3. That several stock transactions, perfectly visible to everybody and documented in monthly broker statements available to bookkeepers, accountants and everyone else were claimed by IRS to have been overlooked, notwithstanding the fact that only a couple of transactions out of millions of dollars handled in the period involved, and Petitioner understood the sales involved came from the cashing in of corporate bonds and nothing is due IRS.

4. Petitioner further alleges that he is not a bookkeeper, had no bookkeeping experience, and made every attempt possible to have the books and records kept by the bookkeepers open to the IRS and the certified public accountants.

5. Petitioner further alleges that the law firm representing him in the tax case refused to permit an independent auditing firm which he had engaged to audit all the records involved to testify, although members of the auditing firm sat ready to testify throughout the trial; that the case was tried without a jury, and the Petitioner's counsel, apparently believing that there was not possibly any case against Petitioner, refused to permit him to testify; that the Court found Petitioner guilty and fined him $3,000.00 on each of two counts and $1,000.00 on another count; that the Court in no way made any statement whatsoever impugning the morals or character of the Pe-

titioner, but, instead, concluded that the Petitioner should have been aware of the accounting procedures when he signed the tax returns involved, although not one witness ever testified he was instructed to falsify anything.

6. Petitioner further asserts that he was unaware of accounting procedures, provided all the necessary records through his bookkeepers who kept the records, so that the accountants did not prepare any false returns that the Petitioner possibly could have been aware of.

7. Petitioner further alleges that the two certified public accountants who prepared the tax returns admitted they were retained by Petitioner to check on each other and make sure the returns were correct.

Respectfully submitted,

SYDNEY M. EISENBERG
Petitioner

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